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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1381

JOSEPH N. TOONI and DANIEL L. EDWARDS, JR.,
Petitioners,

v.

EUGENE ZUCKERT, SECRETARY OF THE AIR FORCE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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May 8, 1969

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Joseph N. Tooni and Daniel L. Edwards, Jr., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cases on December 10, 1968.

CITATIONS TO OPINIONS BELOW

The decisions of the Court below, the Petitions for Rehearing, the District Court Orders and the Orders of the Sixth Circuit Court of Appeals are unreported, but are included in the record and are appended hereto.

JURISDICTION

The judgments of the Court of Appeals were entered October 16, 1968. Petitions for Rehearing were denied

December 10, 1968. An extension of time until May 9, 1969, for filing a Petition for Certiorari was granted by this Court on March 8, 1969. The jurisdiction of this Court is invoked under 28 U.S. Code, § 1254.

QUESTIONS PRESENTED

1. Is agency removal of Federal Civil Service employees subject to meaningful judicial review?

2. Whether constitutional, statutory and procedural rights provided by applicable law and government regulations were provided to Petitioners.

3. Did material issues of fact prevent Summary Judgment against Petitioners?

(a) Tooni contends that purported removal for intentional false statements and omission of an arrest contained genuine issues of material facts.

(b) Edwards contends he was rated efficient in May 1961, but was later alleged to be inefficient in watching Bob Hope movies, creating genuine issues of material facts.

4. Was the Veterans Preference law violated?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The Fifth Amendment of Constitution of United States (emphasis supplied):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Veterans Preference Act of 1944, as amended, § 863, now 5 U. S. Code § 7512:

"Sec. 863. *DISCHARGE, SUSPENSION, ETC., ONLY FOR CAUSE: REASON IN WRITING: ADVANCE NOTICE: PERSONAL APPEARANCE: FINDINGS AND RECOMMENDATIONS*

No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, heretofore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointments except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: PROVIDED, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same

to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: PROVIDED FURTHER, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 864 of this title."

REGULATIONS: The pertinent text of the following regulations are set forth in the Appendix:

Air Force Manual 40-1 (AF A-1, Sec. 5) dated 31 December 1961
Air Force Manual 40-1 (AF A-12.5) dated 31 December 1961
Air Material Command Manual 40-2 (AMCM 40-2) dated 29 July 1959
DAAFDM 40-1 Dated 1 September 1961

STATEMENT OF THE CASES

These cases involve identical or closely related questions. In each case the District Court had jurisdiction under Title 28, United States Code § 1361, giving the district courts jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Petitioners.

The facts underlying each employee's removal are necessarily different, however, and accordingly the basic facts of the two cases are set out separately.

JOSEPH N. TOONI CASE

The Petitioner, Joseph N. Tooni, was born in Iraq. He is a naturalized citizen of the United States.

He entered the Federal Service on July 16, 1947; he was a Captain in the United States Army Quartermaster Corps, as a Petroleum Engineer, in charge of oil distribution in Okinawa, during Korea, 1951-1954 (subsequently honor-

ably discharged as a Major); he was a Development Engineer for Aero-Jet General Corporation, Sacramento, California, from March, 1956 to September, 1957; Chemical Engineer for American Independent Oil Company from 1957 to 1958; Ordinance Engineer, GS-9 from March, 1958 to September, 1958, at the U. S. Naval Propellant Plant, Indian Head, Maryland, and finally a GS-11, Chemical Engineer, at the same location, from September, 1958 to January, 1960.

The items complained of on his Form 57 relate as far back as 1934 when Mr. Tooni was at Hope College. Mr. Tooni's Affidavit in regard to each item of alleged misrepresentation is attached. (App. 1a)

Mr. Tooni was originally employed by the Government in July, 1947, as a GS-5 Chemist for the Navy Department, receiving additional promotions and transfers to GS-7 for the Army Materiel Inspector; to GS-9, Reserve Chemist—Army Ordnance; then after experience as a civilian with Aero-Jet General, to Chemical Engineer for American Oil Co., then GS-9, Ordnance Engineer (same grade as on previous separation); then GS-11, Chemical Engineer, Navy. After a year of satisfactory service, the Navy automatically rated him a GS-12. He was rated a GS-12 by the Navy *BEFORE* he came to Dayton for interview; subsequently he was employed by the Air Force Department based upon the Civil Service and Navy rating of GS-12, which rating was based upon satisfactory service as a GS-11, from September, 1958 to January, 1960.

After an additional 2½ years he was re-classified by the Air Force Depot as a Mechanical Engineer because of *experience* on the job; that subsequently a *mass transfer* placed him with AFLC (Air Force Logistics Command), Wright-Patterson Air Force Base, at the same grade level and job title, GS-12, Mechanical Engineer, that no promotion of any nature occurred; on February 7, 1964, he

received the Notice of Proposed Removal effective April 3, 1964, for *various* previous alleged falsifications on his employment applications dating back to 1958, and for one previous offense.

Another item is necessary for a complete and thorough appraisal of this case. This whole case started when Mr. Tooni was implicated in a separate matter and an investigation was requested about February 15, 1962, while he was employed at the Gentile Depot at Dayton, Ohio. [See Para. 7 Notice of Proposed Removal Letter. App. 9a]. Mr. Tooni was cleared of having anything to do with that matter under investigation, but in the course of the investigation it was learned that Mr. Tooni had not attended California State College, as stated on his Form 57.

Upon investigation it was determined, however, that he did attend the University of California Extension School, in Sacramento, California, in which the facilities of Sacramento State College were utilized.

Further investigation revealed that certain courses were non-credit courses, but Tooni never claimed them to be credit courses in the first place.

From this inadvertent investigation, we now find a long time Federal employee being removed for fraudulent Forms 57 of 1958, 1959, 1960, and 1961. We have this situation, despite the fact that Mr. Tooni had been with the Air Force as a GS-12 since January, 1960, over two years prior to this investigation on a separate matter.

This background puts this entire case into perspective, and helps to explain why Petitioner contends that the Chicago Region was correct in finding that there was no intentional mis-stating of material information.

Mr. Tooni appealed his removal to the Civil Service Commission in Chicago, stating that the removal action does not meet the criteria of the regulations for removal from the Federal Service nor to promote the efficiency of the

service and the United States Civil Service Commission, Chicago Regional Director, so found on June 2, 1964, reversing the agency action of removal.

On further appeal by the Agency, the Board of Appeals and Review, United States Civil Service Commission, on August 28, 1964, reversed the Chicago Regional Director.

Petitioner contends that said Board of Appeals and Review acted in an arbitrary and capricious manner and abused its discretion for the reason that the representations on Petitioner's Form 57 were old and not material to Petitioner's employment by the Air Force. Further, said Board of Appeals and Review failed to determine any materiality to the adverse action in question. Petitioner contends that his then current position with the Air Force was obtained solely on the basis of his past experience, and accordingly any representation as to educational accomplishments were not relevant to any promotion or even his retention in his then current assignment.

The United States Civil Service Commission, on October 30, 1964, refused to reopen the Appeal, and accordingly Petitioner's administrative rights have been exhausted.

Petitioner filed his complaint in the United States District Court at Dayton, Ohio, and after the case was at issue, Cross-Motions for Summary Judgment were filed.

Subsequently, the District Court decided on July 3, 1967 that this case was controlled by the Sixth Circuit decision in *Fass* v. *Ruegg*, 379 F. 2d 216 and sustained the Government's motion. The Sixth Circuit affirmed on October 16, 1968.

DANIEL L. EDWARDS CASE

The Petitioner Daniel L. Edwards, Jr., entered the federal service 14 July 1942, as a Civil Service employee, served in the military service from March 1943 to March 1946, and had over 19 years total federal service at the time of the removal hereinafter referred to.

Mr. Edwards was a Missile Inspection Specialist, GS-12, top-step. During the spring and summer of 1961 he became concerned with the lack of assignment of work for him to perform. He grew tired of watching movies for lack of work assigned, and in June 1961, he requested a Job Audit. On or about 13 September 1961, the Chief Classification and Wage Administrative Branch reviewed Petitioner's job description and informed Mr. Edwards officially by memo that his job would be re-audited in November 1961.

Subsequently, Petitioner was given interim duty tasks, many menial in nature, little information and generally was given insufficient facts and reports, denied access to readily available military and technical information necessary to perform the interim tasks assigned pending the forthcoming November 1961, re-audit; and generally Petioner was hindered and obstructed in his efforts to perform the tasks assigned.

On 17 October 1961, a meeting was held which began an avalanche of requests by Petitioner for protection of his job rights, all of which were repeatedly ignored by the Air Force. A few days after the October meeting, Mr. Edwards was asked to initial a purported summary of the 17 October meeting. Mr. Edwards did not agree with the summary and advised Management accordingly. Mr. Edwards initialed the summary to show that he had seen it and promptly requested an investigation by the Department of Inspector General. The Inspector General's office stated by letter dated 14 November 1961 that Petitioner's request should be handled as a request for a grievance hear-

ing. In the meantime, Mr. Edwards had already asked for a grievance hearing on 18 October 1961 and on 2 November 1961.

As stated, these requests for a hearing were ignored and finally Mr. Edwards suffered a heart attack and was placed on sick leave.

While at home recuperating from his illness, the Petitioner received a "Notice of Proposed Removal" dated 15 February 1962. In the meantime, Petitioner had again requested a grievance hearing by letter to the Commander of the 2907th Air Base Group dated 25 January 1962. It is uncontroverted that the "Notice of Proposed Removal" contained erroneous advice to the employee in regard to which civil service regulations would govern the action for removal.

Petitioner did not return to work until 2 April 1962, at which time he again requested a hearing and also the opportunity to answer orally under the Veterans Preference Law. He was told to answer in writing and was denied an oral hearing. Subsequently, only a few days before the effective date of removal he was then asked if he wanted an oral hearing, but was still not given the correct advice as to applicable Civil Service Regulations until he was handed a "corrected Notice of Proposed Removal" on the very day of the effective date of the Proposed Removal. This "Corrected Notice" extended the effective date of separation to 23 April 1962.

Petitioner again requested a grievance hearing on 17 April 1962 and was finally given a hearing on 16 May 1962.

Petitioner complains that the Chairman of the Hearing Committee was selected from a wrong Civilian Personnel Office, the Chairman of the Hearing Committee conducted pre-hearing interviews contrary to Air Force Regulations, that the Committee Chairman failed to follow regulations in regard to notifying witnesses and having them available,

and that the decision of the Grievance Committee and notification to the employee were not in accordance with Air Force Regulations.

Petitioner continued to seek administrative review until 4 May 1964 when the Department of the Air Force refused additional review.

Petitioner filed his Complaint in the United States District Court on 11 June 1964, claiming irregularities in the removal procedure which resulted in his separation from the federal service on 23 April 1962.

Subsequently, the District Court decided on 3 July 1967 that this case was controlled by the Sixth Circuit decision in *Fass* v. *Ruegg*, 379 F. 2d 216 and sustained the Government's motion. The Sixth Circuit affirmed on October 16, 1968.

REASONS FOR GRANTING THE WRIT

QUESTION 1.

IS AGENCY REMOVAL OF FEDERAL CIVIL SERVICE EMPLOYEES SUBJECT TO MEANINGFUL JUDICIAL REVIEW?

Each Petitioner has his specific reasons for bringing his case to this Court. Common to both Petitioners, however, is the fact that neither has had a review of his case that has meant any relief to Petitioners. Petitioners do not just shout "sour grapes", but are concerned that they have not been given their day in Court; that if the present decisions stand that all federal employees similarly situated will likewise fall flat on their faces when seeking judicial review.

Why do these Petitioners feel so strong that they are right and the Respondent wrong? Simply because the facts and law COMPEL A REVERSAL OF THE COURTS BELOW.

What has happened so far in Petitioners' fight for what is right, fair, just, and legal is that the District Judge felt he did not have the authority to review and grant relief. District Judge Weinman indicated at the close of oral arguments that he believed the employees deserved consideration—"I'll have to see if I can do anything." The District Judge felt compelled, however, to follow *Fass* v. *Ruegg*, 379 F.2d 216 (CCA, 6th 1968). In short, Petitioners were denied a fair judicial review based upon an apparent growing trend in the federal law that the decisions of administrative bodies (Civil Service Commission, Secretary of the Air Force) are not subject to judicial review except for arbitrary and capricious action.

Actually, the rule began with the theory that a reviewing Court should not have to substitute its opinion for the wisdom or good judgment of the agency in exercising dis-

cretion. *Baum* v. *Zuckert*, 342 F.2d 145, (CCA, 6th 1965) and citations therein.

The problem is: When do the Courts review and substitute the Court's judgment for that of the administrative body? Effective review and reversal of error by administrative bodies has been done, and recently. *Louks* v. *United States*, 395 F.2d 993 (Ct. Claims 1968); *Scott* v. *Macy*, 349 F.2d 182 (CCA, D.C. 1965).

Petitioners contend strenuously that their cases are stronger than either *Louks* or *Scott*, and bear little resemblance to *Baum* or *Fass*.

Are Petitioners to be penalized because they brought their cases in the Sixth Circuit rather than the District of Columbia?

Further, both Petitioners are Veterans. The Veterans Preference Act prohibits discharge of Petitioners except "for such cause as will promote the efficiency of the service."

How can one reconcile the review afforded in the *Scott* case which involved *an application for employment* as opposed to long time federal career employment by Petitioners? In *Scott*, a person alleged to be a homosexual was granted judicial review reversing the administrative body. Was this not the Court of Appeals for the District of Columbia substituting its judgment for that of the Civil Service Commission?

Petitioners do not find fault with *Scott*; but find it difficult to swallow when Petitioners have years of satisfactory service, both military and civilian; and now they cannot obtain justice in their cases.

A person's business, occupation, or calling is "property" within the meaning of the constitutional provisions as to due process of law, and is included in the right to liberty and the pursuit of happiness. 11 *Amer. Jur.* 1148.

There is no question but what the Bill of Rights of the Constitutions of Ohio and of the United States protects an

individual's right to work and to follow a chosen trade or occupation.

In the case of *Seligman* v. *The Toledo Motion Pictures*, 88 Ohio App. 137 (1947), the Court stated in the fourth syllabus:

> "The right to labor, to follow a chosen trade or occupation, and to earn a livelihood for oneself and those dependent on him, is a property right within the benign protection of the bill of rights of the Ohio Constitution, and of the Constitution of the United States, and the invasion of that right is a legal wrong for which the law provides a remedy.
>
> "In the instant case, the action taken by the local union, depriving plaintiff of his right to work and have employment in the field where he is trained and learned through years of labor, is arbitrary, unreasonable, violative of plaintiff's constitutional rights and contrary to public policy."

At this point, Petitioners will state separately their reasons why each believes his case should and must be reversed.

JOSEPH N. TOONI (SEPARATE ARGUMENT)

QUESTION 2.

WHETHER CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS PROVIDED BY APPLICABLE LAW AND GOVERNMENT REGULATIONS WERE PROVIDED TO PETITIONER:

Petitioner Tooni's removal is based on alleged false misrepresentations on his Application for Employment, Form 57. As the Chicago Region of the Civil Service Commission found; never, even in the Letter of Proposed Removal, was Petitioner Tooni accused of intentional false statements. The Chicago Region decision stated:

> "The Agency has made no allegation or showing that the falsifications with respect to Appellant's educational background in any way affected his qualifications, competency, or ability to perform his job, or that they were otherwise material."
>
> "Upon consideration of the *entire record* it is found that the removal action does not meet the criterion of the regulations that the action be taken in order to promote efficiency of the Service."

One must remember that Petitioner Tooni is a native of Iraq. When he said he attended a course at the Sacramento State College and it turned out to be the University of California at Sacramento, does this even sound like fraud?

Procedural error exists in that Petitioner's so called additions to his Form 57 were never screened and accepted in any formal manner by the government, as required by regulation. The various supplemental sheets were never offered by Petitioner as anything other than general information. Actual educational credits are screened and *accepted* by an interviewing officer of the government. This was never done in this case.

In any event, the Form 57 attachments which have been attacked in this case were made out in *1958, two years* prior to the application for transfer to the Air Force. This does not make a case of intentional falsification.

Mr. Tooni is a naturalized citizen who has served his new country in both military and civilian capacities. He even had had an admonishment growing out of an argument arising out of a supervisor who questioned his loyalty. Now this admonishment is being used as one of the basis for his removal.

It is inconceivable that a veteran of World War II and Korea and over fifteen years federal service can be removed from his job and income for alleged falsifications having absolutely no showing of intent and materiality.

The letter of Proposed Removal contains no allegation of intention nor deliberate falsification, nor does it contain any motivation. The importance of this was mentioned in the decision of the Chicago Region, and the Agency never has established materiality nor intent. The Air Force did attempt to remedy this procedural error after the decision of the Chicago Regional Office, in a letter dated June 10, 1964, Air Force Logistics Command, to the Board of Appeals and Review. In this letter the Air Force, for the first time, attempted to justify materiality and intent, even though the items were not a part of the Notice of Proposed Removal. And even to this date, the Air Force has not produced evidence of intent and/or materiality. In any event, the Notice of Proposed Removal failed to set forth the required allegations of the regulations, and therefore Mr. Tooni's removal is illegal and contrary to law and the rules and regulations of the Civil Service Commission and the United States Air Force.

Removals which assume facts which do not exist, or are not adequately supported by evidence, do not promote the efficiency of the service.

In addition to the alleged false statements, Tooni was cited for failure to list an arrest on his Form 57. This is a real question of fact and is on all fours with *Weinberg* v. *Macy*, 360 F.2d 816 (CA, D.C. 1965), wherein the employee did not realize he was actually arrested. The arrest that the agency claims was omitted by Mr. Tooni involved his looking for the Racquet Club which was located in suburban Kettering South of Dayton. One evening, while Petitioner was on South Ludlow Street in downtown Dayton, Mr. Tooni asked a policeman for directions to the Racquet Club, but with his accent, Racquet sounded liked "Roc-ket." The policeman was busy rounding up some drunks from the Rocket Bar on South Ludlow Street and said to Petitioner, "You are already there."

Petitioner Tooni, not realizing he was in front of the Rocket Bar, inquired again, where is the Racquet (Roc-Ket) Club. The Dayton policeman, rather perturbed by now, said "You are at the Rocket Bar now, and you had just better get into this wagon with the rest of these fellows."

Before he knew it, Tooni was driven to the Police Station, and booked for drunk. At that time Petitioner was able to convince the Desk Sergeant that he was not drunk, that the whole thing was a mistake, and that he was just trying to get to the Racquet Club.

The Desk Sergeant informed Tooni that he was supposed to hold "drunks" for six hours or so, but that if he wanted to give him ten dollars, he could leave, which Tooni did.

This is the arrest which Tooni is charged with omitting from his Form 57! There is a serious question of fact as to whether Mr. Tooni even knew or realized he was actually "arrested."

Petitioner Tooni stated in an Affidavit given in rebuttal to the Letter of Proposed Removal:

> "Affiant states that with reference to the charge of falsifying item number 33 through the omission of required information relating to arrests, he was driving and he stopped to ask a police officer for directions to the Racquet Club and this was in front of the Rocket Bar to which he had already been directed; that the officer assumed he was drunk because he was otherwise occupied and affiant had to ask the officer the same question 2 or 3 times; that the officer may have felt affiant did not know affiant was already where it seemed he wanted to be. (Officer misunderstood "Racquet" for "Rocket"). The officer was putting youngsters who were in the Rocket Club into the police wagon, and was probably irritated and the officer told affiant to get in the wagon also; that at the police station, affiant was told to pay Ten Dollars ($10.00)

> and told it would be forgotten about; affiant understood there would be no record made of the incident; affiant then went back to his car and drove to the Racquet Club. Affiant was not drunk; that the entire incident took less than two (2) hours including a fifteen (15) minute walk back to his car. Affiant did mention his arrest in Upper Marlboro, Maryland, and he would have mentioned the Dayton, Ohio incident if he had felt it was really recorded as an arrest."

Petitioner Tooni's Affidavits given to the Civil Service Commission and in support of his Motion for Summary Judgment (reserving his right to a trial of material facts) clearly placed the burden of proving all aspects of the Government's case on the agency. See the first two syllabi of the *Weinberg* case:

> "1. A genuine issue of material fact existed as to whether civil service employee, discharged on ground he made an intentional false statement in application for federal employment, knew or should have known that state court proceedings in which he was involved, inaccurately described by government as bastardy proceedings, involved an arrest, charge or holding for violation of the law, precluding summary judgment in declaratory action relating to discharge.
>
> 2. From beginning burden was on government, in discharge proceedings based upon intentional false statements in application for federal employment, to establish intentional falsification."

The conclusion is clear. No intent. No materiality. No fraud. Intent is a question of fact, and the government has not shown this fact, especially by summary judgment.

Justice demands that Petitioner be restored to his government job.

DANIEL L. EDWARDS, JR.,
(SEPARATE ARGUMENT)

Petitioner Edwards' removal is based upon alleged inefficiency after 19 years of satisfactory service with the Federal government. The period of alleged inefficiency was from 17 October 1961 to 15 February 1962.

In May 1961, Petitioner Edwards received a satisfactory efficiency rating. Subsequently, as referred to in the Statement of Facts in the Daniel L. Edwards case, Petitioner became involved in a series of happenings that started with the Petitioner not having work to do, and ended with the Petitioner being removed from the Federal service, despite numerous procedural violations by the Air Force. There is no question but that Petitioner was subjected to harassment during the crucial period from October to February. Petitioner was denied his pay, given an illegal one (1) day suspension, which was corrected only by the Petitioner appealing to the Inspector General and to the Comptroller General of the United States. (See letter AFLC, W-P AFB, Ohio dated 13 Dec. 1962.) (App. 35a).

Management claimed Petitioner was not performing satisfactorily and illegally AWOL. Petitioner was entitled to time away from his work duties to carry on his official complaints regarding the improper charge of AWOL and suspension of pay. Management, displeased with Petitioner's success, denied information and data to Petitioner to deter his accomplishment of the work tasks assigned to him, and carried on their vendetta against Petitioner by giving him the Notice of Proposed Removal while Petitioner was home recuperating with a heart attack. A vendetta that began when the Petitioner refused to give to the Colonel's church and Petitioner's request for a job audit which brought unwanted attention upon Petitioner's superiors.

In other words, in the short period of time from 17 October, until Petitioner went on sick leave, February 12, 1962, and while Petitioner spent many hours disproving unfounded charges of AWOL, and was frustrated by lack of material and information with which to work, (not to mention the holidays involved—Veterans Day, Thanksgiving, Christmas and New Year), Petitioner was supposed to have become inefficient.

As evidence of Petitioner's continuing his successful fight at the time, see letter dated 23 January 1962, (App. 37a).

During this same period of time, Management and Personnel were violating their own regulations right and left, by refusing a Grievance Hearing to Petitioner in accordance with regulations.

QUESTION 2.

WHETHER CONSTITUTIONAL, STATUTORY AND PROCEDURAL RIGHTS PROVIDED BY APPLICABLE LAW AND GOVERNMENT REGULATIONS WERE PROVIDED TO PETITIONER.

Did the refusal to give employee a timely Grievance Hearing and timely opportunity to answer orally violate Air Force Regulations and the Veterans Preference Law?

It is clear that a Veterans Preference Eligible is entitled to answer charges against him personally and in writing. Veterans Preference Act § 14, 5 U.S.C.A. § 7512. The case of *Paterson* v. *U. S.*, 319 F. 2d 882 (Ct. Cl., 1963), wherein the Court stated the reasoning behind the right of answering personally:

> "In employment relations particularly, mitigating circumstances, often of a highly personal nature, may save a job for a person who, but for these circumstances, would and should be discharged. Whether,

> if the plaintiff had been permitted to make this kind of a personal appeal to his superior, it would have saved his job, we do not know. But when Congress gave to the veteran the right to appear personally, it must have intended to give him the chance of succeeding in such an appeal. The naked facts, without the personal appeal, could be just as well stated in writing. And Congress knew, as we all know, that bureaucratic superiors, like other human beings, are susceptible to the effect of personal appeals."

In addition to the Veterans Preference Act, applicable regulations designed to provide grievance hearings were violated from October 1961 to April 1962. The applicable DESC regulations include the following:

> "If the grievance cannot be resolved informally, the supervisor to whom the grievance is presented in writing, will initiate action within 10 working days to obtain pertinent facts; afford opportunity to persons complained against to make a written reply; render a devision, and notify the employee in writing of his decisions and reasons. *If the decision is not acceptable to the employee, he will be informed that he may present his grievance in writing, through the remaining supervisory levels, to the Commander.*
>
> If the employee requests a hearing, the statement of grievance will be sent to the Civilian Personnel Officer who will insure that an impartial grievance committee is convened within 10 working days of the date of receipt of the request to hear the grievance. If the statement does not contain a specific request for a grievance hearing the employee will be contacted orally to determine whether he desires a hearing. This information will be recorded with the statement of grievance and forwarded to the Installation Commander."

Since DESC was organized in July 1962, superceding Dayton Air Force Depot, the DAFD regulations would

be applicable to the petitioner's discharge. Again, patent non-compliance is evident because petitioner's requests for a grievance hearing began at least as early as 18 October 1961 (to Inspector General), 2 November 1961 (Grievance Request to Commander, Dayton Air Force Depot), 17 April 1962 (Grievance Request to Civilian Personnel Officer, Heath (with copy to Dayton Air Force Depot.) No grievance hearing was convened until 16 May 1962. No reasons for delay were communicated to the employee. This violation (repeated violations) are inexcusable and contrary to the above quoted regulations. And regulations are an important interpretation and become part of the statutory law. See AFM 40-1, A-12.5 dated 31 December 1961, Page 23, which provides as follows:

> ". . . In view of decisions of the United States Supreme Court which have emphasized the importance of adherence to procedural requirements when taking adverse personnel actions, the Commander will assure, when making his decision, that there has been compliance with applicable procedures whether externally imposed or established by the Air Force at any level. If unusual circumstances cause a delay, the employee will be notified of the reasons in writing."

To compound this departure from required procedure, the employee was notified about September 12, 1962, of the decision of the Grievance Committee instead of within ten (10) working days as required by regulations. Neither the Committee nor the Commander complied with the time stipulations required by regulation DAAFDM 40-1, par. 7, which provides as follows:

> "Within 10 working days after completion of the hearing, the Committee or the CPO, if no hearing was held (paragraph 6f) will prepare a complete record of the grievance to the Commander. The Commander

will consider the findings and recommendations of the Committee or CPO; make a decision, and give written notice of the decision to the employee within 10 working days of the date on which the recommendations were received."

Recapping, these dates appear as follows:

		DATE OF REQUIRED ACTION	ACTUAL ACTION
18 Oct. 1961	1st Grievance Request	1 Nov. 1961	None
2 Nov. 1961	2nd Grievance Request	16 Nov 1961	None
25 Jan. 1962	3rd Grievance Request	8 Feb. 1962	None
17 Apr. 1962	4th Grievance Request	1 May 1962	16 May 1962
Decision of Grievance Committee		3 June 1962	12 Aug. 1962
Notification to Employee		13 June 1962	12 Sep. 1962

Petitioner contends strongly that his statutory right to answer personally must be made available to him timely and when it is meaningful; that his numerous requests for a grievance hearing were, in effect, requests to answer personally, and that had he been given the right to confront his superiors personally as contended by the statute and as provided for in the applicable regulations, that he would have been able to defend himself against the trumped up charges of inefficiency.

Of course, the denial of request for grievance hearings, in and of itself, violates the procedural requirements set forth by Air Force Regulations, just as in the case of *Camero* v. *U. S.*, 375 F. 2d 777 (Ct. Cl. 1967).

Incidentally, there is no question but that the meeting of 17 October 1961, is interrelated to the removal action. This is substantiated by the letter of proposed removal dated 15 February 1962 wherein the 17 October 1961 meeting was mentioned at least seven (7) times, and, the tasks which are used as the basis for the removal are the same tasks assigned as "interim" tasks in the 17 October meeting.

Whether or not Petitioner was ever given a proper 30 day notice, is another question, which will now be discussed.

Was the required Notice of Proposed Removal procedurally correct when it was received by employee while on sick leave and when the Notice contained incorrect advice to the employee?

DENIAL OF 30-DAY NOTICE OF PROPOSED REMOVAL

Appellant contends that the receipt of the letter of proposed removal by him at home while on sick leave and his return to duty on or about 2 April 1962 does not constitute the 30-day notice required by law and regulation prior to his separation on 23 April 1962. This allegation is necessarily related to the following denial of statutory right regarding a retroactive amendment to the notice of proposed removal. Taken separately, one might question the denial of a statutory right when an employee receives a notice while at home on sick leave, but considered in conjunction with the fact that he did not return to work until a time less than 30 days of the actual time of his termination of employment, we find that we have a different set of circumstances. The sick leave alone, is one thing, and coupled with the lack of 30 working days back to work, adds to the denial of this statutory right. It is not contended that Petitioner was off work for any reason adverse to the government, and therefore it is normally contemplated that the employee remains on the job during the 30-day period. This inherently provides the employee with access to applicable regulations generally available at the place of employment. See Air Material Command Supervisor's Manual, AMCM, 40-2, Page 14, dated 29 July 1959, which provides in part as follows:

"17. STATUS OF EMPLOYEE DURING NOTICE PERIOD:

a. Normally, the employee will be retained in his position in a work status during the notice period of a pending suspension, removal, or separation action.

b. The immediate supervisor, through the appropriate operating official, may request that the employee be withdrawn from his position and/or the work area for the period if there is valid reason to believe his presence:

> May result in damage to Government property. May be detrimental to the interests of the Government. May be injurious to the employee, his fellow workers, or the general public.

c. When it is necessary to place the employee in another position during the notice period, an appropriate written request, stating the reason why the action is necessary, will be forwarded to the Civilian Personnel Office for consideration. On the basis of reasons given and applicable procedural requirements, a determination will be made as to the exact status of the employee during the notice period."

If the notice of proposed removal in the instant case was in all respects accurate, the Court would have before it the sole question of whether or not an employee on sick leave must have at least 30 days of work after returning from sick leave, before the effective date of the separation. However, in the instant case, we have these facts combined with an erroneous notice, which will now be discussed.

NOTICE OF PROPOSED REMOVAL QUOTED ERRONEOUS REGULATIONS

It is admitted that the last sentence of the letter of proposed removal dated 15 February 1962 is erroneous in that Section 102 (a) (1) of Section 9 of the Civil Service Regulations would govern the action. This was admittedly incorrect, yet this employee at home until 2 April 1962, was given a corrected Notice of Proposed Removal on the very day of the effective date: 20 April 1962. See the retroactive decision to Remove, letter of Col. Lawton dated 20 April 1962. (App. 25a.) Taken alone, this would appear

to be a patent violation of the Veterans Preference Law. The Veterans Preference Law contemplates a correct Notice of Proposed Removal being in the veteran's hands at least 30 days prior to the effective date of the removal. This was obviously not complied with in this case. In fact, on the very day of proposed effective termination, the original 15 February letter was changed in a material respect, thus denying this veteran the statutory rights afforded him by the Veterans Preference Law.

This Section 14 of the Veterans Preference Law is mandatory as set forth in *Stringer* v. *United States*, 117 Ct. Cl. 30. See page 50 of this decision wherein the Court discussed a 29 day notice as being insufficient to comply with a 30 day requirement. Among other things the Court stated:

> "Although it informed plaintiff that he might appeal under existing War Department regulations, it did not inform him of his right, under Section 14, to answer personally and in writing and to furnish affidavits in support of his answer."
>
> ". . . There is no indication that any fresh consideration was given to the matter of plaintiff's demotion following his protests."

It would be hard to imagine a case more parallel and on all four as the Stringer case is to this case. Just as in the Stringer case, Petitioner's repeated requests for a grievance hearing or in some other manner to answer personally were always denied or ignored by the Air Force. The Stringer case emphasized that the employee's rights cannot be so ignored.

Was a non-voting Chairman selected from the proper Civilian Personnel Office, as required by Air Force Manual 40-1, Chapter AF, A-1, Sec. 5?

Air Force Regulations provide that a non-voting Chairman should be selected from the Civilian Personnel Office.

See AFM 40-1, Chapter AF, A-1, Sec. 5, which provides in part:

> ". . . a non-voting chairman generally will be selected from among the best qualified members of the servicing civilian personnel office. In the event a key member of the civilian personnel office is directly involved in the grievance, e.g., he is the person against whom the complaint was lodged, or will appear as a witness, the chairman may be selected from outside of the installation civilian personnel office."

Mr. Bradshaw, the appointed chairman was working for Col. Lawton, the supervising management. There is no question but that the branch in which Petitioner was employed was being serviced by DESC (Defense Electronic Supply Center.) See SF 50 (Standard Form 50), Notification of Personnel Action, signed by Brad Robbins, DESC. (App. 30a) Note Item No. 32 entitled "Office Maintaining Personnel Folder": DESC, but see the Order (Special Order M-104) dated 14 May 1962, appointing the grievance committee, including Mr. Bradshaw, with his office designation: MAHRA. (App. 32a) Note that this office symbol is identical to that of the complaining management, Col. Lawton. See letter of Col. Lawton dated 20 April 1962 with his office symbol being MAHQI. (App. 33a) These symbols mean Middletown Air Materiel, Heath Annex. Col. Lawton was the "Director of Heath Operations" as shown by his signature block beneath his name. The symbol shown on the Order appointing the members of the Committee above referred to, show that Mr. Bradshaw was a member of the same Heath Branch, under the direct supervision of Col. Lawton. As stated above, the regulations which implement the statutes regarding Civil Service employees require the Chairman to be from the servicing Civilian Personnel Office. In the instant case, that office was DESC, under the supervision of Brad Robbins (not Col. Lawton).

It is clear, therefore, that the District Court erred in failing to answer this issue, which constitutes another procedural violation.

Did the Chairman of the Hearing Committee conduct pre-hearing interviews contrary to AFM 40-1, and AFA 12.5?

Mr. Bradshaw conducted pre-hearing meetings specifically contrary to Regulation 40-1 and AFA 12.5. There seems to be no contention but that Mr. Bradshaw did conduct pre-hearing meetings. In the face of sub-section 5.3 F, quoted below, this would appear to be a patent violation of statutory rights:

> "f. The civilian personnel officer will furnish advisory service to all persons concerned in preparing for a hearing. He will designate the *member(s) of his staff, other than the chairman of the committee*, to conduct pre-hearing interviews with the aggrieved employee or his representative and the operating official or his representative." (Emphasis supplied)

The Committee chairman runs the hearings. He passes upon evidence and other matters of procedure and generally is a strong force in the evidence adduced at the hearing. It is absolutely essential that the chairman be unbiased and not a member of the management team which has brought the charges in the first instance.

Did the Committee Chairman follow regulations in regard to notifying witnesses to be available for cross-examination?

There is no question but that the right to have witnesses notified in advance and have them available for cross-examination is a valuable right of which this Petitioner was deprived. See *Williams* v. *Zuckert*, 372 U.S. 765.

As evidence that this was not complied with is the statement on Page 19 of the Transcript, wherein the Chairman admits that he did not inform the witnesses in writing:

> ". . . The point is that before I could officially deliver my letters to the witnesses and to their supervisors, I had to ascertain that their testimony was relevant to the case."

Air Force Manual 40-1, Page 20, Par. 3b provides as follows:

> "When the committee chairman requests and Air Force employee to appear as a witness at the hearing, the request will be in writing and sent direct to the employee with a copy to the employee's supervisor. The employee will be advised that it is his duty to testify, that the testimony of witnesses given freely and honestly is basic to a fair and equitable decision and that his appearance as a witness will be free from any form of interference, criticism, or reprisal on the part of the management."

Petitioner contends that any one of the procedural violations mentioned provide sufficient grounds for reversal of the lower Court. Certainly, taken together, there can be no question but that Petitioner's constitutional, statutory and procedural rights were violated.

In the case of *Vitorelli* v. *Seaton*, 359 U.S. 535, the Court ordered reinstatement for procedural violations when the employee was a temporary non-veteran employee. Of special note is the fact that a revised "Notification of Personal Action" was held not to remedy a prior erroneous notification. Certainly, this applies to the purported revision of Petitioner's "Notice of Proposed Removal" on the effective date of removal. And, if this is not enough to deny Petitioner his statutory and procedural rights, again, certainly the combination of procedural violations require Petitioner

to be reinstated. For example, can a revised "Notice of Proposed Removal," changing the applicable regulations under which the employee was being removed, afford the mandatory 30-day notice to a Veteran Preference Eligible who was removed on 23 April 1962 after receiving the Revised Notice on 20 April 1962?

As stated in *Camero* v. *U.S.*, 375 F 2d 777 (Ct. Cl. 1967):

> "Failure by the Agency to observe these procedures or the standards of fairness, implicit therein makes the attempted unfavorable resolution of an employee's grievance abortive and of no effect."

QUESTION 3.

DID MATERIAL ISSUES OF FACT PREVENT SUMMARY JUDGMENT AGAINST PETITIONERS?

It is apparent from the foregoing discussion of the Tooni and Edwards cases that there are many genuine issues of material fact in each case.

Tooni contends that purported removal for intentional false statements and omission of an arrest contained genuine issues of material facts.

In the Tooni case, the questions of fraudulent intent, the many factual issues regarding whether or not the employee intended to list "credit courses", or just hours attended, whether the college courses listings were material, whether or not the alleged misrepresentations were cured by an Amendment of January 1962, whether the omission of the arrest in Dayton, Ohio, was an arrest that the employee knew or should have known to be an arrest, that had to be listed on his Form-57—all of these factual issues preclude a Summary Judgment in favor of the Government. *Weinberg* v. *Macy*, supra.

Edwards contends he was rated efficient in May 1961, but was later alleged to be inefficient in watching Bob Hope movies, creating genuine issues of material facts.

In the Edwards case, there are factual questions such as whether or not the Petitioner was the object of a personal vendetta by Management to oust a 19 year employee for religious or other personal reasons, whether or not the employee was prevented from being efficient by management harassment and time consuming defense of erroneous charges during a brief period shortened further by sick leave and holidays, whether or not the Grievance Committee Chairman was or should have been disqualified, whether or not the Petitioner was denied rights of facing his accuser, whether or not the Chairman conducted prehearing interviews contrary to regulations. All of these factual issues preclude a Summary Judgment in favor of the Government.

See *Weinberg* v. *Macy*, supra.

QUESTION 4.

WAS THE VETERANS PREFERENCE LAW VIOLATED?

The Veterans Preference Act precludes discharge of Petitioners "except for such cause as will promote the efficiency of the service and for reasons given in writing . . . AND PROVIDED, that such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative. . . ."

Does "promote the efficiency of the service" mean that experienced and valued employees should be discharged from their right to earn a living—denied their property rights guaranteed under the Fifth Amendment—without review of the administrative body?

In both the Tooni and Edwards cases, there has not been proper opportunity for these veterans to answer the charges lodged against them.

In Tooni's case, the employee was never permitted to answer personally the charges made by Management after the initial decision by the Chicago Regional Office of the Civil Service Commission. It was only *after* the Chicago Region decision that Management made any allegations of fraudulent intent—and this was after the case was in Washington at the Board of Appeals and Review—where the Air Force had a liaison representative but the employee had no liaison representative in Washington, nor any opportunity to answer personally at that level. This would not be so important were it not for the fact that it was only at this level that allegations of fraud and materiality were first made.

Such a discharge does not constitute compliance with either the spirit of the law or the Veterans Preference Act.

In the case of Petitioner Edwards, the right to answer personally was frustrated from October through April of the following year despite repeated requests by the employee, and when an opportunity to answer personally was belatedly afforded Edwards a few days before the decision on his proposed removal, the damage was already done, his job was out the window and the Veterans Preference Act had been shoved aside all during the time when it could have meant everything to the employee in mustering his defenses. Compliance with the Veterans Preference Act must not be a perfunctory compliance but a meaningful one—the employee must be given the opportunity to answer when it is not too late.

In view of all of the procedural errors by Management and denial of rights of Petitioners, can it be said that these discharges promote the efficiency of the service?

Justice demands that Petitioners be restored to their Government jobs.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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